Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 85-108)

Restatement of the New York Customs Region Geographical Boundaries

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the Customs Service field organization by restating the geographical boundaries of the New York Customs Region. The document is part of Customs continuing program to update and establish clear, well-defined geographical boundaries for all of the Customs regions.

EFFECTIVE DATE: July 29, 1985.

FOR FURTHER INFORMATION CONTACT: Denise Crawford, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to update and establish clear, well-defined geographical boundaries for all of the Customs regions, Customs is amending § 101.3(b), Customs Regulations (19 CFR 101.3(b)), by publishing a restatement of the geographical boundaries of the New York Customs Region.

The New York Customs Region is comprised of three administrative areas which were created by T.D. 71-19, published in the Federal Register on January 20, 1971 (36 FR 946), namely the Kennedy Airport Area, the Newark Area, and the New York Seaport Area. There have been two changes in these areas since their inception. Richmond County, New York, was transferred from the Newark Area to the New York Seaport Area by T.D. 76-59, published in

the Federal Register on February 27, 1976 (41 FR 8473). In addition, Morris County, New Jersey, was transferred from the then Region III (Baltimore), to the Newark Area of the New York Region by T.D. 78-130, published in the Federal Register on May 9, 1978 (43 FR 19832).

Although there has been no change in the configuration of the New York Region since 1978, a review was recently completed by Customs officials of the geographical limits of these areas. The three purposes for performing the review were to: (1) Identify what the present limits are; (2) redefine the limits in terms that will assure that any future changes will be within Customs, rather than local government control; and (3) publish the new limits in a final document so that persons doing business in the region would be relieved of the complicated legal research now necessary whenever these limits come into question.

Customs published a notice in the Federal Register on January 9, 1985 (50 FR 1063), proposing the restated geographical limits of each of the three administrative areas of the New York Customs Region. The one comment received in response to the notice suggested that since the purpose of this project is to establish clear, well-defined geographical boundaries, any reference to non-geographic descriptions should be eliminated. Customs agrees. Accordingly, the geographical limits of each of these areas will be as follows:

Kennedy Airport Area

The geographical limits of the Kennedy Airport Area are defined as beginning at a point in the Atlantic Ocean at the foot of Beach 95th Street, Rockaway Beach, and proceeding north along the center line of Cross Bay Boulevard and its continuation, Woodhaven Boulevard, to Atlantic Avenue; then east along the center line of Atlantic Avenue to the Van Wyck Expressway; then north along the center line of the Van Wyck Expressway to Hillside Avenue (Route 24); then east along the center line of Hillside Avenue to 212th Street; then south along the center line of Route 24 (212th Street, Jamaica Avenue, and Hempstead Avenue) to the New York City limits, the boundary line between Queens and Nassau Counties; then along this boundary line to the Atlantic Ocean, and then along the shore line to the point of beginning. In addition, La Guardia Airport and the U.S. Naval Air Station at Floyd Bennett Field are designated as parts of the Kennedy Area.

Newark Area

The geographical limits of the Newark Area consist of the counties of Bergen, Essex, Hudson, Middlesex, Monmouth, Morris, Passaic, Sussex, and Union, all in the State of New Jersey. The port of Perth Amboy, which is located approximately 30 miles south of Regional Headquarters, is organizationally aligned to report to the Newark Area.

New York Seaport Area

The geographical limits of the New York Seaport Area include all that part of the State of New York not encompassed by the Kennedy Airport Area, the Buffalo-Niagara Falls district, and the Ogdensburg district. The port of Albany, which is located approximately 155 miles north of Regional Headquarters, is organizationally aligned to report to the New York Seaport Area.

Where questions arise as to the concept of "port limits" in respect of Customs transactions under the jurisdiction of the New York Seaport and Newark Areas (exclusive of Albany), the port limits are construed to be coextensive with the boundaries of the so-called "Port of New York District" which was created by an agreement between the State of New York and the State of New Jersey, consented to by Congress, and precisely defined in 42 Stat. 175f, approved August 23, 1921 (T.D. 40809, dated April 25, 1925).

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Imports, Organization.

Authority

This change is made under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by E.O. 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II) and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

Amendments to the Regulations

PART 101—GENERAL PROVISIONS

To reflect the changes, Part 101, Customs Regulations (19 CFR part 101), is amended as set forth below:

§ 101.3 Customs regions, districts and ports.

To reflect the restatement of the geographical boundaries of the New York Customs Region, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by removing "T.D. 71–19 and T.D. 76–59" in the last sentence under the column headed "Area" in the New York City, N.Y., Customs District of the New York Region, and inserting, in their place, "T.D. 85–108".

Executive Order 12291

Because this amendment relates to the organization of the Customs Service, pursuant to § 1(a)(3), of E.O. 12291, it is not subject to the Executive Order.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this amendment. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs related activity in various parts of the country. Accordingly, it is certified under the provisions of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service Headquarters. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: May 23, 1985.
Edward T. Stevenson,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, June 28, 1985 (50 FR 26694)]

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19 CFR Part 4

(T.D. 85–109)

Customs Regulations Amendments Relating To Passengers on Foreign Vessels Taken on Board and Landed in the United States

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Customs is amending its regulations relating to the transportation of passengers by a foreign vessel between ports or places in the U.S. either directly or by way of a foreign port. The amendment provides that, with certain exceptions, such transportation is prohibited when passengers are actually embarked at one port or place in the U.S. and disembarked at another port or place in the U.S. This amendment will more accurately reflect the scope and intent of the coastwise trade passenger statute which contains no provision for exceptions based upon the number of hours a vessel is in port, such as is provided in the current regulations. The prohibition will not apply when passengers are so transported between such ports or places on a voyage touching foreign ports other than nearby foreign ports. The amendment will simplify the administration of the statute for Customs, be of benefit to the econo-

my of certain of the American coastwise ports affected, and in no way erode the statutory protection given to American vessels engaged solely in domestic trade.

EFFECTIVE DATE: July 31, 1985.

FOR FURTHER INFORMATION CONTACT: Edward B. Gable, Jr., Director, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5732).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title 46, United States Code, section 289 provides that no foreign vessel shall transport passengers between ports or places in the U.S., either directly or by way of a foreign port, under a penalty of $200 for each passenger as transported and landed.

Section 4.80a, Customs Regulations (19 CFR 4.80a), provides that a foreign vessel which takes a passenger on board at a port in the U.S., its territories, or possessions embraced within the coastwise laws ("coastwise port") will be deemed to have landed that passenger in violation of the coastwise laws (46 U.S.C. 289): (1) If the passenger goes ashore, even temporarily, at another coastwise port on a voyage to one or more coastwise ports but touching at a "nearby foreign port or ports" (as defined in § 4.80a(c), Customs Regulations (19 CFR 4.80a(c)), but at no other foreign port, and (2) if during the course of the voyage the vessel remains in the coastwise port (not including the port of embarkation) for more than 24 hours, without regard to whether the passenger ultimately severs his connection with the vessel at the port which he embarked. The 24-hour rule of § 4.80a(2) does not apply to a trip on which the vessel would at some time touch at a foreign port other than a "nearby foreign port," for example, a port in Europe or in South America.

The essence of the 24-hour rule was originally stated in T.D. 55147(19) of June 3, 1960 (95 Treasury Decisions 297), because it was believed at that time that it was necessary to implement a workable administrative rule of interpretation by which to effectively and efficiently ascertain violations of the coastwise passenger statute, 46 U.S.C. 289.

Customs has been advised that certain American coastwise ports, such as those in Alaska, Florida, and Puerto Rico, are placed in a disadvantageous position in their competition with nearby foreign ports for tourist business due to present § 4.80a(a)(2) and that the net result is to hurt the economy of these American ports by depriving them of revenue. It has been recommended that the 24-hour limit be extended to permit foreign-flag vessels from U.S.

ports to be able to land passengers at other U.S. ports for longer periods.

The references in § 4.80a to a 24-hour rule and nearby foreign ports are the result of attempts by Customs to apply an Attorney General's opinion dated February 26, 1910 (28 O.A.G. 204). In that case, a foreign-flag vessel transported 615 passengers between New York and San Francisco. However, the Attorney General stated that since the passengers were so transported on a cruise around the world, the primary object of the passengers was to visit various parts of the world on a pleasure tour and then return home via California, not be transported in domestic commerce, and therefore the transportation was not in violation of 46 U.S.C. 289.

The 1910 Attorney General's opinion was extended to voyages touching at foreign ports other than nearby foreign ports, as defined in § 4.80a(c), Customs Regulations, by T.D. 68–285 (33 FR 16558, November 14, 1968). On the other hand, voyages solely to one or more coastwise ports have always been considered predominantly coastwise in their nature and object and therefore passengers on such a voyage temporarily going ashore at a coastwise port have been deemed to have been disembarked in violation of the statute. An example of such a voyage would be one including only coastwise ports in California and Hawaii.

The terms "embark" and "disembark" are trade words of art which normally mean going on board a vessel for the duration of a specific voyage and leaving a vessel at the conclusion of a specific voyage. In this normal context the words do not contemplate temporary shore leave for any specified number of hours during a voyage. It has been determined that the use of the terms in the amendment will follow the intent of Congress and clarify the scope of the regulations. That the statutory language "so transported and landed" means the final and permanent disembarking is further shown by the following Attorney General Opinions:

1. 28 O.A.G. 204, February 26, 1910, citing a statement by the Chairman of the interested House committee at the time that the legislation relates to "the conveyance of passengers between ports of the United States";

2. 29 O.A.G. 318, February 12, 1912, stating that words of the statute "imply a transportation beginning at one port or place in the United States and ending at another port therein";

3. 30 O.A.G. 44, February 1, 1913, covering the application of the statute to passengers joining a vessel in a port of the U.S. and "disembarking at the port of New York" and referring to the passengers' "ultimate destination, New York, and landed there"; and

4. 36 O.A.G. 352, August 13, 1930, covering the application of the statute to passengers on a vessel which "would transport them from San Francisco to Honolulu" even though the passengers "later embarked" on another vessel for a foreign country.

To assist Customs in gauging the degree of interest in adjusting the 24-hour rule, an advance notice was published in the Federal Register on April 25, 1984 (49 FR 17769), inviting public comment. After consideration of the 193 comments received in response to the advance notice, it was determined to propose a specific amendment to § 4.80a.

Customs published a notice in the Federal Register on January 9, 1985 (50 FR 1060), proposing specific amendments and inviting public comments to be submitted by March 11, 1985. Following is a discussion of the comments received in response to that notice.

Discussion of Comments

As a result of the notice, 176 responses were received from national, state, and local government officials; port authorities; unions; trade associations; vessel operators; individuals; and various miscellaneous sources. Those responding demonstrated overwhelming support for the proposal, with only 13 negative comments.

Of those opposing the proposal, several state that the present 24-hour rule, and/or the proposed liberalization of that time limit, are contrary to the intent of the Congress, dating back to 1886 when the coastwise passenger statute was enacted.

As stated in the notice, the essence of the 24-hour rule was originally stated in T.D. 55147 (19), June 3, 1960 (95 Treasury Decision 297). Customs is satisfied, after administering the 24-hour rule for a quarter of a century, that it is not contrary to the intent of the statute, which is to reserve for American-flag vessels the transportation of passengers from one U.S. port to another. Further, the amendment will not change the present prohibition on the transportation of passengers on foreign vessels solely on voyages between coastwise ports. At present, passengers embarking on a foreign vessel touching nearby foreign ports who go ashore temporarily at a subsequent U.S. port where the vessel remains for more than 24 hours are considered transported in violation of the coastwise laws. In addition to causing administrative problems for Customs, the 24-hour rule hurts the economy of the subsequent U.S. port since the net result is that passengers temporarily going ashore will spend 24 hours or less in the U.S. port and much more time in the nearby foreign ports visited by the vessel. The proposal is limited to providing that on such a voyage, the passengers going ashore will only be in violation of the coastwise laws if they disembark at the subsequent U.S. port, i.e., do not come back on board the vessel and depart with it when it leaves the port.

It is of paramount importance in this area to consider the primary object of passengers in taking a voyage. The attorney General's opinion of February 26, 1910 (28 O.A.G. 204), cited earlier in this document, is the authority for considering this primary object. The need to confirm the object of a particular voyage, even one

which upon first examination may appear to be prohibited by the strict letter of the coastwise passenger statute, was clearly confirmed by the only major federal court decision on the subject in the case of *The Granada*, 35 Supp. 892 (1940). In light of the above-cited authorities, Customs will continue to be alert with an eye to detecting any violations of the passenger coastwise transportation statute.

One commenter states that it is "currently engaged in the design and engineering" of a passenger vessel, that "plans call for the vessel to enter service sometime in 1987," and that the amendment would "jeopardize" its position. If in fact a U.S.-flag, U.S.-built passenger vessel were to be built after the amendment, under the statute, Customs would continue to prohibit competition by any foreign-flag and/or foreign-built vessel in the transportation of passengers solely between U.S. ports, whether the passengers disembarked or only went ashore temporarily. Further, under the statute, Customs would continue to prohibit competition by any foreign-flag and/or foreign-built vessel in embarking passengers at one U.S. port, touching at a nearby foreign port, and disembarking the passengers at a second U.S. port. We do not believe that permitting foreign-flag foreign-built vessels on voyages touching nearby foreign ports to allow passengers who embarked at U.S. ports to go ashore temporarily at other U.S. ports will jeopardize any U.S.-flag U.S.-built vessels that will be built in the future. First, we believe that a prohibition on such activity by foreign vessels would simply result in either the foreign vessels offering fly and sail packages so that American passengers would embark on foreign vessels in foreign ports or the foreign vessels dropping U.S. ports from their itineraries. The net result would be a great loss for American business at U.S. ports where American passengers now embark on foreign vessels or visit temporarily while a foreign vessel is in port. Second, we believe that if at some future date it was actually shown that U.S.-flag U.S.-built vessels were hurt by the amendment and Customs did not take remedial steps, the Congress would quickly take appropriate action.

One commenter suggests that the language of the amendment, as proposed, be changed to reflect that the regulation also applies to U.S.-flag vessels which are not qualified to engage in the coastwise trade for the reason that they are foreign built. We believe that this suggestion has merit and the amendment has been changed to reflect this point.

One commenter suggests that terms used in the regulation be defined. We agree with this comment and the regulations have been so revised.

Another commenter recommends that the regulations should reflect the Puerto Rico passenger vessel statute enacted on October 30, 1984, as Public Law 98-563. We agree with this comment also and have included this point.

Many of the negative comments state that the amendment will hurt the U.S.-flag passenger fleet. To our knowledge there is no regular salt water U.S.-flag passenger fleet that has vessels touching nearby foreign and U.S. ports. Many of the negative comments also state that the amendment will hurt efforts to revitalize the U.S.-flag passenger fleet. If it is ever shown that there are U.S.-flag U.S.-built vessels capable of successful economic competition with foreign vessels in voyages touching nearby foreign and U.S. ports, and that such U.S.-flag U.S.-built vessels are in fact hurt by provisions of the Customs Regulations, we will immediately reconsider the regulations.

After consideration of all the comments, we believe that the amendment will simplify the administration of the statute for Customs, will be of benefit to the economy of certain of the American coastwise ports affected, and will in no way erode the statutory protection given to American vessels engaged solely in domestic trade (e.g., all of the many U.S.-flag U.S.-built passenger vessels operating on the inland waters of the U.S. solely between U.S. points would continue to be protected from competition by foreign vessels). However, as stated above, we do believe that three minor and non-substantive changes should be made, as follows:

1. The terms used should be defined in the regulations to make them more intelligible to those unfamiliar with them.

2. The amendment should specifically cover U.S.-flag vessels not qualified to engage in the coastwise trade as well as foreign-flag vessels.

3. The amendment must refer to the special exemption for vessels transporting passengers between Puerto Rico and other U.S. ports, enacted on October 30, 1984, as Public Law 98–563 (98 Stat. 2916); see 46 U.S.C. 289c.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Analysis

Pursuant to the provisions of § 3 of the Regulatory Flexibility Act (Pub. L. 96–353, 5 U.S.C. 301 *et seq.*), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S.

Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4, Customs Regulations (19 CFR Part 4), continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103;

§ 4.1 also issued under 46 U.S.C. 163;

§ 4.2 also issued under 19 U.S.C. 1433, 1441, 1486;

§ 4.3 also issued under 19 U.S.C. 288, 1434, 1435, 1441; 46 U.S.C. 111;

§ 4.5 also issued under 19 U.S.C. 1441;

§ 4.6 also issued under 19 U.S.C. 1585;

§ 4.7 also issued under 19 U.S.C. 1431, 1439, 1465, 1581(a), 1583; 46 U.S.C. 883a, 883b;

§ 4.7 also issued under 19 U.S.C. 1431, 1432, 1439, 1465, 1498, 1584; 46 U.S.C. 674;

§ 4.8 also issued under 19 U.S.C. 1448, 1486;

§ 4.9 also issued under 19 U.S.C. 1434, 1435; 42 U.S.C. 269; 46 U.S.C. 677;

§ 4.10 also issued under 19 U.S.C. 1448, 1451;

§ 4.12 also issued under 19 U.S.C. 1440, 1584;

§ 4.14 also issued under 19 U.S.C. 1466, 1498;

§ 4.15 also issued under 46 U.S.C. 310;

§ 4.16 also issued under 19 U.S.C. 1435b;

§ 4.20 also issued under 46 U.S.C. 77, 81, 83–83k, 121, 128, 8103;

§ 4.21 also issued under 19 U.S.C. 1441; 46 U.S.C. 121–125, 128, 129, 132, 135;

§ 4.22 also issued under 46 U.S.C. 121, 128, 141;

§ 4.24 also issued under 46 U.S.C. 2108;

§ 4.30 also issued under 19 U.S.C. 288, 1446, 1448, 1450–1454, 1490;

§ 4.31 also issued under 19 U.S.C. 1453, 1586;

§ 4.32 also issued under 19 U.S.C. 1449;

§ 4.35 also issued under 19 U.S.C. 1447;

§ 4.36 also issued under 19 U.S.C. 1431, 1457, 1458; 46 U.S.C. 100;

§ 4.37 also issued under 19 U.S.C. 1448, 1457, 1490;

§ 4.38 also issued under 19 U.S.C. 1448, 1505;

§ 4.39 also issued under 19 U.S.C. 1432, 1446;

§ 4.40 also issued under 19 U.S.C. 1446;

§ 4.50 also issued under 19 U.S.C. 1431;

§ 4.65a also issued under 46 U.S.C. 86–86i, 88–88g;

§ 4.66 also issued under 46 U.S.C. 91;

§ 4.66a also issued under 33 U.S.C. 1321; 46 U.S.C. 91;
§ 4.66b also issued under 33 U.S.C. 407, 1321;
§ 4.68 also issued under 46 U.S.C. 674, 817d, 817e;
§ 4.74 also issued under 46 U.S.C. 91;
§ 4.75 also issued under 46 U.S.C. 91;
§ 4.80 also issued under 46 U.S.C. 13, 251, 289, 319, 802, 808, 883, 883–1;
§ 4.81 also issued under 19 U.S.C. 1433, 1439, 1442, 1443, 1444, 1486; 46 U.S.C. 251, 313, 314, 883;
§ 4.81a also issued under 46 U.S.C. 883;
§ 4.82 also issued under 19 U.S.C. 293, 294; 46 U.S.C. 123;
§ 4.83 also issued under 46 U.S.C. 91, 111, 123;
§ 4.84 also issued under 19 U.S.C. 1433, 1435, 1437; 46 U.S.C. 91, 313, 314, 883–1;
§ 4.85 also issued under 19 U.S.C. 1439, 1442, 1443, 1444, 1623;
§ 4.86 also issued under 19 U.S.C. 1442, 1443, 1444;
§ 4.88 also issued under 19 U.S.C. 1442, 1622, 1623;
§ 4.93 also issued under 19 U.S.C. 1322(a); 46 U.S.C. 883;
§ 4.94 also issued under 19 U.S.C. 1433, 1434, 1435, 1441; 46 U.S.C. 91, 104, 313, 314;
§ 4.98 also issued under 31 U.S.C. 9701;
§ 4.100 also issued under 19 U.S.C. 1706.

2. Section 4.80a is revised to read as follows:

§ 4.80a Coastwise transportation of passengers.

(a) For the purposes of this section, the following terms will have the meaning set forth below:

(1) *Coastwise port* means a port in the U.S., its territories, or possessions embraced within the coastwise laws.

(2) *Nearby foreign port* means any foreign port in North America, Central America, the West Indies (including the Bahama Islands, but not including the Leeward Islands of the Netherlands Antilles, i.e., Aruba, Bonaire, and Curacao). A port in the U.S. Virgin Islands shall be treated as a nearby foreign port.

(3) *Distant foreign port* means any foreign port that is not a nearby port.

(4) *Embark* means a passenger boarding a vessel for the duration of a specific voyage and *disembark* means a passenger leaving a vessel at the conclusion of a specific voyage. The terms *embark* and *disembark* are not applicable to a passenger going ashore temporarily at a coastwise port who reboards the vessel and departs with it on sailing from the port.

(5) *Passenger* has the meaning defined in § 4.50(b).

(b) The applicability of the coastwise law (46 U.S.C. 289) to a vessel not qualified to engage in the coastwise trade (i.e., either a foreign-flag vessel or a U.S.-flag vessel that is foreign-built or at one time has been under foreign-flag) which embarks a passenger at a coastwise port is as follows:

(1) If the passenger is on a voyage solely to one or more coastwise ports and the passenger disembarks or goes ashore temporarily at a coastwise port, there is a violation of the coastwise law.

(2) If the passenger is on a voyage to one or more coastwise ports and a nearby foreign port or ports (but at no other foreign port) and the passenger disembarks at a coastwise port other than the port of embarkation, there is a violation of the coastwise law.

(3) If the passenger is on voyage to one or more coastwise ports and a distant foreign port or ports (whether or not the voyage includes a nearby foreign port or ports) and the passenger disembarks at a coastwise port, there is no violation of the coastwise law provided the passenger has proceeded with the vessel to a distant foreign port.

(c) An exception to the prohibition in this section is the transportation of passengers between ports in Puerto Rico and other ports in the U.S. on passenger vessels not qualified to engage in the coastwise trade. Such transportation is permitted until there is a finding under 46 U.S.C. 298c that a qualified U.S.-flag passenger vessel is available for such service.

(d) The owner or charterer of a foreign vessel or any other interested person may request from Headquarters, U.S. Customs Service, Attention: Carrier Rulings Branch, an advisory ruling as to whether a contemplated voyage would be considered to be coastwise transportation in violation of 46 U.S.C. 289. Such a request shall be filed in accordance with the provisions of Part 177, Customs Regulations (19 CFR Part 177).

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 13, 1985.
JOHN M. WALKER, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 1, 1985 (50 FR 26981)]

U.S. Customs Service

General Notice

Application for Recordation of Trade Name: "INTERNATIONAL BUSINESS MACHINES CORPORATION"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "INTERNATIONAL BUSINESS MACHINES CORPORATION" used by International Business Machines Corporation, a corporation organized under the laws of the State of New York, located at Old Orchard Road, Armonk, New York 10504.

The application states that the trade name is used in connection with the following merchandise manufactured in numerous foreign countries: information handling systems and associated components and supplies including data processing equipment; copying machines; printers; word processing; electro-mechanical office equipment; computers; terminals; input and output devices, computer programs; magnetic tape; magnetic disks; diskettes; modems; books, business forms, typewriter ribbons, educational publications; and type fonts.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before August 26, 1985.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Room 2417, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Beatrice E. Moore, Entry, Licensing and Restricted Merchandise Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: June 20, 1985.

EDWARD T. ROSSE,
Acting Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, June 26, 1985 (50 FR 26434)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 162 and 171

Proposed Customs Regulations Amendments Relating to Fines, Penalties, and Forfeiture Procedures

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to aid in the expedition of the disposal of property seized and forfeited for violations of the Customs laws. This proposal results from provisions of the Comprehensive Crime Control Act of 1984 and the Trade and Tariff Act of 1984, which made changes to the Tariff Act of 1930 in the procedures governing administrative forfeiture proceedings and the disposition of seized property. The proposed amendments include revisions to both the administrative petitioning process and the summary forfeiture process.

DATE: Comments must be received on or before August 26, 1985.

ADDRESS: Comments (preferably in triplicate) may be addressed to, and inspected at, the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5746).

SUPPLEMENTARY INFORMATION:

Background

Sections 311-323 and 2304 of the Comprehensive Crime Control Act of 1984 (Pub. L. 98-473) and section 213 of the Trade and Tariff Act of 1984 (Pub. L. 98-573), made various changes to the Tariff Act of 1930 with regard to the forfeiture and disposition of property seized by Customs. These changes include the expanded use of administrative forfeiture proceedings to permit the Government to

478-993 O - 85 - 2

perfect title to seized property more quickly, without having to resort to lengthy judicial proceedings; the transfer of forfeited property to other federal agencies and state or local law enforcement agencies which participated in the seizure of the property; and more expedited procedures for the disposition of seized property. These proposed changes are intended to reduce Customs costs for seizure and storage of seized property and the processing of penalty and forfeiture cases resulting from the seizure of the property.

To aid in the expeditious processing of these cases, certain regulatory changes are proposed that would reduce the amount of time property is held in Customs custody, thus reducing the costs of seizure and storage. Specific proposed changes include: (1) Reducing petitioning time in seizure cases from 60 days to 30 days; (2) authorizing expedited destruction or other disposition of low-value property under seizure when the costs of storage of the property are disproportionate to its value; (3) changing requirements for publication of administrative forfeiture notices so as to reduce seizure costs; (4) further restricting the granting of extensions of time to file petitions for relief; and (5) increasing the district director's authority to accept payment of the appraised value of seized property from $50,000 to $100,000, inclusive. A detailed discussion of the proposed changes follows.

Discussion of Proposed Changes

1. Existing § 162.32, Customs Regulations (19 CFR 162.32), provides procedures to be followed by Customs when a petition for relief is not filed by a person who is liable for a fine, penalty, or claim for a monetary amount, or who has an interest in property subject to forfeiture. Presently, a 60-day period from the mailing date of the violation notice is allowed before any action is taken by Customs. Section 162.32 also lists conditions under which a district director may grant extensions of time for filing petitions for relief. However, the wording of current § 162.32 may be confusing in that application of these conditions for extension appear to be limited to cases arising under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), for undervaluation of merchandise.

The proposed amendment to § 162.32 would reduce the petitioning time from 60 days to 30 days. It also would make it clear that extensions are not limited to 19 U.S.C. 1592 cases. Paragraph (a) of § 162.32 would be divided into new paragraphs (a), (b) and (c). New paragraph (a) would require referral of any fine or penalty case to the U.S. attorney, or the Department of Justice, if the penalty was assessed under 19 U.S.C. 1592, if no petition is received in 30 days. In any case involving a forfeiture, where no petition is received in 30 days, either administrative forfeiture proceedings would be completed or the case would be referred to the U.S. attorney, or the Department of Justice if the case arises under 19 U.S.C. 1592. New paragraph (b) would state that nothing in the regulations is intend-

ed to prevent the institution of forfeiture proceedings before completion of the administrative remission or mitigation procedures under § 618, Tariff Act of 1930, as amended (19 U.S.C 1618). The provisions of 19 U.S.C. 1618 permit remission of forfeitures at any time before sale of the property subject to forfeiture. Forfeiture proceedings should not be held in abeyance simply because an administrative petition is under review. New paragraph (c) would provide for the referral of seized property not eligible for administrative forfeiture to the U.S. attorney, or the Department of Justice if the penalty was assessed under 19 U.S.C. 1592, within 30 days rather than 60 days.

The provisions of current § 162.32(a) relating to the time for filing petitions in cases in which the statute of limitations will become available as a defense in 180 days or less, have been revised as proposed § 171.12(d), Customs Regulations (19 CFR 171.12(d)). The provisions of current § 162.32(a) relating to the filing of requests for extension of time to submit a petition also have been revised. They are now the subject of proposed § 171.15.

2. Current § 162.44, Customs Regulations (19 CFR 162.44), provides for the release of seized property upon payment of its appraised value. This procedure is provided for by § 614, Tariff Act of 1930, as amended (19 U.S.C. 1614). All requests for payment of the appraised value of the property, if the appraised value exceeds $50,000, must be addressed to the Commissioner of Customs. If the appraised value is $50,000 or less, all requests for payment of the appraised value must be made to the district director.

The proposed amendment to § 162.44 would increase the district director's authority to accept payment of the appraised value of seized property from $50,000 to $100,000, inclusive. Acceptance of a money payment equal to the appraised value of seized property worth in excess of $100,000 would remain in the jurisdiction of the Commissioner.

3. Current § 162.45, Customs Regulations (19 CFR 162.45), provides procedures for Customs to follow for publication of notices of forfeiture of property which is the subject of administrative forfeiture proceedings. If the value of the forfeited property exceeds $250, paragraph (b)(1) requires publication of administrative forfeitures in a newspaper of general circulation in the Customs district in which the property was seized. It has been determined by Customs that in many cases these publication costs can be prohibitive when compared to the value of the property being advertised.

Proposed § 162.45(b)(1) would eliminate the language "of general circulation" to permit publication in less costly periodicals in the district. All known claimants would receive detailed notices explaining their rights, and they would be informed of the name of the newspaper in which publication of the notice of forfeiture will appear and the dates on which publication is intended. The value

of property that must be forfeited by newspaper publication would also be raised from $250 to $2,500.

Current § 162.45(b)(2), Customs Regulations, permits local publication of forfeiture notices by posting of a notice in a conspicuous place accessible to the public at the customhouse nearest the place of seizure and in the customhouse at the headquarters port for the Customs district. This method of publication is used if the value of the seized property does not exceed $250. It is proposed to amend this section to apply local publication rules to notices involving property to be forfeited valued at $2,500 or less.

A proposed amendment to current § 162.45(c), Customs Regulations, would allow delay of the publication and forfeiture process for a period not exceeding 30 days, thus conforming it to the proposed reduction in petitioning time from 60 days to 30 days.

4. Section 162.46(d), Customs Regulations (19 CFR 162.46(d)), provides for destruction of property by Customs after summary forfeiture is complete if the net proceeds of the sale of the property would not be sufficient to pay for the costs of the sale. It is proposed to amend this section to add a provision for the immediate destruction or other disposition of the property if the expense of storing the property is disproportionate to its value and such value is less than $1,000.

This new provision would conform § 162.46, Customs Regulations, to new § 612(b), Tariff Act of 1930, as amended (19 U.S.C. 1612(b)), promulgated by § 213 of the Trade and Tariff Act of 1984. Section 612(b) concerns the destruction or other disposition of forfeited property. The new provision is intended to save Customs the significant storage costs on property of limited value. Under this new provision, all petitioning rights will be honored, but satisfaction of property rights would be in the form of money rather than the return of the property.

5. Current § 171.12, Customs Regulations (19 CFR 171.12), provides that, with certain exceptions, petitions for relief must be filed within 60 days from the date of mailing of the notice of fine, penalty, or forfeiture. Proposed § 171.12 would reduce the filing time in all fine, penalty, or forfeiture cases to 30 days. Current § 171.12(d), Customs Regulations, would be redesignated as proposed § 171.12(c). New § 171.12(d) would permit the district director, in cases arising under 19 U.S.C. 1592, to demand that a petition be filed in less than 30 days, but not less than 7 days, if the statute of limitations could be raised as a defense to the penalty in fewer than 180 days from the date of notice of the penalty.

6. New § 171.15 would be added to Part 171, Customs Regulations. It replaces current § 162.32(a)(2), Customs Regulations. New § 171.15 would list the criteria upon which extensions of the proposed 30-day petitioning period could be granted. If the petitioning period is reduced to 30 days, the petitioner must have been absent

from the United States at least 20 of the 30 days to qualify for an extension.

New § 171.15(a)(3) would define situations in which an extension can be granted when evidence is not immediately available to the petitioner so as to allow him to file an effective petition. Legitimate requests for information from other Government agencies, possession of evidence by a party reluctant to relinquish it, or unavailability of evidence in the possession of a foreign source are all reasons upon which an extension can be granted. Another significant change would be proposed § 171.15(b), making retention of new counsel insufficient reason, in and of itself, to grant an extension of time.

7. Current § 171.33, Customs Regulations (19 CFR 171.33), provides that all supplemental petitions for relief must be filed within 60 days from the date of notice to the petitioner of the decision from which further relief is requested. Proposed § 171.33 would reduce the time of filing of supplemental petitions in all fine, penalty, or forfeiture cases to 30 days.

The proposed amendments to §§ 171.12, 171.15 and 171.33 would reduce case processing time, thus reducing storage and other costs relating to the seizure of the merchandise, that may be incurred after the 30-day period. The proposed amendments relating to publication of forfeiture notices would significantly reduce Customs costs of publication.

The proposed amendments concerning the time for filing petitions and extensions thereof would reduce the amount of time seized property is held, thus reducing case processing time and saving Customs manpower hours and other resources.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 1.6, Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

These amendments are proposed under the authority of R.S. 251, as amended, R.S. 5294, as amended, § 9, 24 Stat. 81, as amended, §§ 603, 609, 610, 611, 614, 618, 624, 641, 46 Stat. 754, as amended, 755, as amended, 757, as amended, 759; 49 Stat. 519; § 612, 98 Stat. 2986, (19 U.S.C. 66, 1603, 1609, 1610, 1611, 1612, 1614, 1618, 1624, 1641, 1705; 46 U.S.C. 7, 320).

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 162 AND 171

Administrative practice and procedures, Penalties, Seizures and forfeitures.

PROPOSED AMENDMENTS

It is proposed to amend Part 162, Customs Regulations (19 CFR Part 162), as set forth below.

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. It is proposed to revise § 162.32 to read as follows:

§ 162.32 Where petition for relief not filed.

(a) *Fines, penalties, and forfeitures.* If any person who is liable for a fine, penalty, or claim for a monetary amount, or who has an interest in property subject to forfeiture, fails to petition for relief under Part 171 of this Chapter, or fails to pay the fine or penalty within 30 days from the mailing date of the violation notice provided in § 162.31 (unless additional time is authorized for filing a petition, as specified below), the district director shall, after required collection action is complete, refer any fine or penalty case promptly to the U.S. attorney, or the Department of Justice if the penalty was assessed under § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592). In the case of property subject to forfeiture, the district director, where appropriate, shall complete administrative forfeiture proceedings or shall refer the matter promptly to the U.S. attorney, or the Department of Justice if the case arose under § 592, in accordance with the provisions of subsection (c) below, unless the Commissioner of Customs expressly authorizes other action.

(b) *Institution of forfeiture proceedings before completion of administrative procedures.* Nothing in these regulations is intended to prevent the institution of forfeiture proceedings before completion of the administrative remission or mitigation procedures pursuant to § 618, Tariff Act of 1930, as amended (19 U.S.C. 1618).

(c) *Seized property is not eligible for administrative forfeiture.* If the seized property is not eligible for administrative forfeiture, and neither a petition for relief in accordance with Part 171 of this chapter, nor an offer to pay the domestic value as provided for in § 162.44, is made within 30 days (unless additional time has been authorized under § 171.15), the district director shall refer the case promptly to the U.S. attorney for the judicial district in which the seizure was made, or the Department of Justice if the penalty was assessed under § 592.

2. It is proposed to revise paragraphs (a) and (b)(1)(i) of § 162.44 to read as follows:

§ 162.44 Release on payment of appraised value.

(a) *Value exceeding $100,000.* Any offer to pay the appraised domestic value of seized property in order to obtain the immediate release of the property which was seized under the Customs laws or laws administered by Customs and exceeding $100,000 in appraised domestic value, or which was seized under the navigation laws, shall be in writing, addressed to the Commissioner of Customs, and signed by the claimant or his attorney. It shall be submitted in duplicate to the district director for the district in which the property was seized. Proof of ownership shall be submitted with the application if the facts in the case make such action necessary.

(b) *Value not over $100,000*—(1) *Authority to accept offer.* The district director is authorized to accept a written offer pursuant to § 614, Tariff Act of 1930, as amended (19 U.S.C. 1614), to pay the appraised domestic value of property seized under the Customs laws and to release such property if:

(i) The appraised domestic value of the seized property does not exceed $100,000;

* * * * * * *

3. It is proposed to revise the heading and paragraphs (b)(1) and (c) of § 162.45 to read as follows:

§ 162.45 Summary forfeiture: Property other than Schedule I controlled substances. Notice of seizure and sale.

* * * * * * *

(b) *Publication.* (1) If the appraised value of any property in one seizure from one person other than Schedule I controlled substances (as defined in 21 U.S.C. 802(6) and 812) exceeds $2,500, the notice shall be published in a newspaper in the Customs district and the judicial district in which the property was seized for at least three successive weeks. All known parties-in-interest shall be

notified of the newspaper and expected dates of publication of such notice.

* * * * * * *

(c) *Delay of publication.* Publication of the notice of seizure and intent to summarily forfeit and dispose of property eligible for such treatment may be delayed for a period not to exceed 30 days in those cases where the district director has reason to believe that a petition for administrative relief in accord with Part 171 of this chapter will be filed.

4. It is proposed to revise the heading and paragraph (d) of § 162.46 to read as follows:

§ 162.46 Summary forfeiture: Disposition of goods.

* * * * * * *

(d) *Destruction.* (1) If, after summary forfeiture of property is completed, it appears that the net proceeds of sale will not be sufficient to pay the costs of sale, the district director may order destruction of the property. Any vessel or vehicle summarily forfeited for violation of any law respecting the Customs revenue may be destroyed in lieu of the sale thereof when such destruction is authorized by the Commissioner of Customs to protect the revenue.

(2) If the expense of keeping any vessel, vehicle, aircraft, merchandise or baggage is disproportionate to the value thereof, and such value is less than $1,000, destruction or other appropriate disposition of such property may proceed forthwith.

* * * * * * *

It is proposed to amend Part 171, Customs Regulations (19 CFR Part 171), as set forth below.

PART 171—FINES, PENALTIES, AND FORFEITURES

1. It is proposed to revise § 171.12 to read as follows:

§ 171.12 Filing of petition.

(a) *Where filed.* A petition for relief shall be filed with the district director for the district in which the property was seized or the fine or penalty imposed.

(b) *When filed.* Unless additional time has been authorized as provided in § 171.15 of this chapter, petitions for relief shall be filed within 30 days from the date of mailing of the notice of fine, penalty, or forfeiture incurred.

(c) *Number of copies.* The petition shall be filed in triplicate.

(d) *Exception for certain cases.* If a penalty is assessed under § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), and fewer than 180 days remain from the date of the penalty notice before the statute of limitations may be asserted as a defense, the district director may specify in the notice a reasonable period of time shorter than 30 days but not less than 7 days for the filing of a petition for relief.

2. It is proposed to amend Part 171 by adding a new § 171.15 to read as follows:

§ 171.15 Extensions of time for filing petition.

(a) *Extension of time for filing petition or supplemental petition for relief.* If there is at least 1 year before the statute of limitations may be asserted as a defense, a district director may extend the time for filing a petition or supplemental petition, upon the request of a person who is liable for a fine or penalty, or who has an interest in property subject to forfeiture, in the following situations:

(1) The person is incapacitated and unable to prepare or to assist in the preparation of a petition.

(2) The person is absent from the United States for 20 days or more during the 30-day filing period.

(3) Evidence necessary to file an effective petition is not immediately available. Evidence is not immediately available if it:

(i) Is in the possession of a foreign source and must be procured from same.

(ii) Is in the possession of a party who has demonstrated a clear unwillingness to relinquish it.

(iii) Requires that a request of any Government agency be complied with, provided that any such request is not frivolous and is made in accordance with law.

(4) The case involves a need to examine voluminous records to learn the facts on which to base a petition, or the need to determine legal responsibilities in a case involving numerous parties or numerous violations.

(5) There is an occurrence of some act of God which makes compliance with petitioning time limits impossible.

(b) *Retention of new counsel insufficient reason to grant extension.* As a general rule, the mere fact that counsel has just been retained, without another enumerated reason, will be insufficient reason to grant an extension of petitioning time.

3. It is proposed to revise paragraphs (a) and (c)(2) of § 171.33, to read as follows:

§ 171.33 Supplemental petitions for relief.

(a) *Time and place of filing.* If the petitioner is not satisfied with a decision of the district director or the Commissioner of Customs, a supplemental petition may be filed with the district director. Such a petition shall be filed either:

(1) Within 30 days from the date of notice to the petitioner of the decision from which further relief is requested if no effective period is prescribed in the decision; or

(2) Within the time prescribed in the decision from which further relief is requested as the effective period of the decision.

(b) * * *

(c)(1) * * *

(2) A second supplemental petition will not be considered except in one of the following circumstances:

(i) If it is filed within 2 years from the date of notice to the petitioner of the decision on the first supplemental petition;

(ii) If it is filed within 30 days following an administrative or judicial decision with respect to the entries involved in the penalty case which reduces the loss of duties upon which the mitigated penalty amount was based; or

(iii) If the deciding official in his discretion determines that the acceptance of a second supplemental petition is warranted.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 23, 1985.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, June 27, 1985 (50 FR 26588)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 84-1694)

ZENITH RADIO CORPORATION, APPELLEE *v.* THE UNITED STATES, APPELLANT

Velta A. Melnbrencis, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellant. With her on the brief were *Richard K. Willard,* Acting Assistance Attorney General and *Michael F. Hertz.*
Frederick L. Ikenson, of Washington, D.C. argued for appellee.

Appealed from: United States Court of International Trade.

Judge MALETZ.

(Appeal No. 84-1694)

ZENITH RADIO CORPORATION, APPELLEE *v.* THE UNITED STATES, APPELLANT

(Decided June 19, 1985)

Before FRIEDMAN, BENNETT, and NEWMAN, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

This is an appeal by the United States from an interlocutory order of the Court of International Trade rejecting the government's contention that it was not required to respond to discovery requests and an interrogatory of the appellee Zenith Radio Corporation (Zenith) because the information Zenith sought was privileged, and directing the government to respond. The Court of International Trade certified its order for immediate appeal and this court authorized the appeal, pursuant to 28 U.S.C. § 1292(d)(1). We reverse and remand.

I

This case grows out of an unsuccesful attempt by Zenith to prevent the United States from settling claims for antidumping duties and civil penalties against 22 importers of Japanese television receivers. On April 28, 1980, the United States effected a settlement of those claims under which the importers agreed to pay the

United States a total of $77 million. A month later Zenith brought an action in the Court of International Trade to enjoin the settlement.

The court issued a preliminary injunction on December 9, 1980, barring the United States from implementing the settlement. In response to a motion by the United States to require Zenith to post a security bond for $11.5 million (the amount of interest the United States would earn on $77 million for one year), the court ordered a bond of $250,000 "to indemnify the defendant should it ultimately be determined that the defendant was wrongfully enjoined * * * ."

Zenith's complaint eventually was dismissed for lack of jurisdiction, and the preliminary injunction was dissolved on November 15, 1982.

The United States then filed a motion for assessment of damages of $250,000 against Zenith and the two sureties on the bond. The asserted damages cover interest the government lost because of the wrongful delay in implementing the settlement. Zenith opposed the motion, contending (1) that interest had accrued in favor of the government during the period of the injunction so that no damages were incurred, (2) that even if there were damages, the government failed to mitigate them because it had not enforced its legal and equitable right to interest from the importers, and (3) principles of equity and fairness preclude the award of damages.

Zenith served the United States with interrogatories and requests for production of documents. Prior thereto Zenith had learned that there had been a dispute between lawyers in the Department of Commerce and the Customs Service over whether the government should have sought interest from the importers. Zenith sought to obtain all documents and the substance of all communications relating to the question whether "interest would or should accrue on the importers' debts under the settlement agreements."

The United States complied extensively with the discovery requests. It stated that there had been an inter-agency dispute and that at meetings in July 1983, Commerce, Customs and Justice Department officials had decided not to seek interest from the importers. The United States, however, asserted attorney-client, work product, or executive privilege with respect to 15 documents and interrogatory 30(c) insofar as it asked for the substance of the three July meetings. Zenith moved to compel discovery, arguing that by seeking damages the United States had waived its privileges.

After examining the material *in camera,* the Court of International Trade held that the government had waived its privilege with respect to all but one document and one sentence in another document. The court ordered the United States to produce the nonprivileged documents and fully to answer the interrogatory.

II

As the Court of International Trade noted, the courts have followed three different approaches in ruling on privileges asserted by plaintiffs. The first theory, which Zenith advocates, is the so-called "automatic waiver" rule under which a party seeking judicial relief waives whatever privilege he has. *See, e.g., Independent Productions Corp.* v. *Loew's, Inc.*, 22 F.R.D. 266 (S.D.N.Y. 1958). A second theory balances the need for discovery against the need for protecting secrecy. *See, e.g., Black Panther Party* v. *Smith*, 661 F.2d 1243 (D.C. Cir. 1981).

The Court of International Trade adopted and applied the third theory, which was enunciated in *Hearn* v. *Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). Under that theory a plaintiff is treated as having waived his privileges if:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Hearn v. *Rhay*, 68 F.R.D. at 581.

The Court of International Trade concluded that

> the *Hearn* test is the better reasoned approach because it avoids the pitfalls of either extreme: (1) the rigidity of the automatic waiver rule, which might permit discovery of items not vital to the movant's defense, and (2) the indeterminacy of the balancing test and the possibility that it may deprive a party of information vital to his defense." [Footnote omitted.]

Following its application of "the three-part *Hearn* test in its *in camera* inspection of each of the fifteen documents for which the government claims privilege," the court concluded that, with the minor exceptions noted above, the government had waived its privileges with respect to the documents and the substance of the three meetings. The court did not explain or discuss its reasoning with respect to any particular document or information.

A. We agree with the Court of International Trade that this would not be an appropriate case in which to apply the automatic waiver rule, under which the United States would be deemed to have waived all its privileges by initiating the judicial proceeding for damages. This is not a case in which the party invoking judicial aid totally refuses to testify. In that situation it has been held that a plaintiff may not hide behind the shield of a privilege and withhold testimony that may materially aid the defense while invoking the aid of the court in prosecuting a claim. *Independent Production Corp.* v. *Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958). Here, as noted, the government complied fully and extensively with most of

the discovery requests and objected only to the small number of documents and small amount of information with respect to which it claimed privilege. Nor is this a case involving First and Fifth Amendment privileges—situations in which the automatic waiver rule has been applied. *See Lyons* v. *Johnson,* 415 F.2d 540 (9th Cir. 1969), *cert. denied,* 397 U.S. 1027 (1970); *Anderson* v. *Nixon,* 444 F. Supp. 1195 (D.D.C. 1978).

Here the privileges the government asserted covered attorney-client communications, attorneys' work product, and the communications, discussions, and deliberations among government officials that the executive privilege protects. These privileges involve sensitive questions and ordinarily should not be breached without a more penetrating analysis than the automatic waiver rule involves.

The attorney-client privilege promotes "confidential relations that may well deal with the very suit in question." 4 *Moore's Federal Practice* ¶ 26.60[6] (2d ed. 1984). The work product privilege protects the attorney's thought processes and legal recommendations, which also may bear directly on the suit in question. The executive privilege, which has been analogized to the work product privilege, protects agency officials' deliberations, advisory opinions and recommendations in order to promote frank discussion of legal or policy matters in the decision-making process. *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 946 (Ct. Cl. 1958); *see also NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 150 (1975). A party does not automatically waive these privileges, which protect the formulation of legal opinions or litigation strategy, simply by bringing suit.

B. The government contends that the proper standard for this case is the balancing test rather than the *Hearn* test the Court of International Trade applied, but that even under the latter standard it should have prevailed. We find it unnecessary to decide which of these two standards is appropriate in this case, since we conclude that under either standard the government's claim of privilege should have been allowed.

Under both the balancing test and *Hearn,* the party seeking the information must make a strong showing of need in order to breach the privilege. Indeed, *Hearn* states that the information sought must be "vital to his defense." Zenith has not made a sufficient showing of need to justify obtaining the privileged information.

The information with respect to which the government claimed privilege relates to the details of the disagreement among government officials over whether, under the settlement agreements, the government was entitled to recover interest on the $77 million the importers agreed to pay. The material contains various agency officials' opinions and recommendations on this legal issue, including memoranda from Justice Department lawyers. Zenith argues that this material is relevant to its defenses, including the claim that

the government failed to mitigate its damages because it could have recovered from the parties to the settlement the interest it seeks to collect from Zenith.

The question whether the government was entitled to recover interest under the settlement agreements is an issue of law, the answer to which turns upon an interpretation of those agreements. When it sought this material, Zenith already knew about the internal disagreement within the government over the government's entitlement to such interest. If the views of the parties to or the drafters of the settlement agreements are pertinent to the resolution of that legal issue—a question on which we intimate no opinion—Zenith has not given any convincing reason why it could not obtain that information by deposing those individuals.

The matters that Zenith seeks to probe by obtaining this information are the views of the various government officials participating in the discussions and conferences regarding the interest question, what was said at those conferences, the advice those officials gave and received, and the extent to which those officials explored the pertinent legal principles and precedents governing the accrual of interest. These matters are tangential to and remote from the central legal issue in the case. To whatever extent they may be relevant to Zenith's defenses, their probative value is too weak to justify breaching the important privileges the government asserted in declining to produce the information.

Like the Court of International Trade, we have reviewed this material *in camera*. Unlike that court, however, we conclude that the government's claims of privilege respecting this material should be upheld.

III

A third part of the court's order compelled responses to several interrogatories asking for the identity of government officials who participated in consideration of the interest issue and the identification of relevant memoranda and contacts in 1983 between officials and private parties regarding this issue. The government asserted a generalized claim of privilege with regard to events subsequent to July 29, 1983, the date it decided not to seek interest from the importers. The Court of International Trade rejected the generalized privilege claim, on the ground that "occurrences subsequent to July 29, 1983 may refer to prior events."

It is unclear whether the government is challenging this part of the order in this appeal. If it is, we agree with the court that the generalized claim of privilege cannot be sustained on the ground the government gave. Communications and discussions after the government decided not to seek interest might illuminate and clarify the prior events. Any government claim of privilege should be made with regard to specific documents and communications and

specify the particular privilege claimed and the basis for its assertion.

The order of the Court of International Trade, directing the United States to produce the documents and to answer a portion of interrogatory 30(c), with respect to which the court denied the government's claim of privilege, is reversed, and the case is remanded to that court.

REVERSED AND REMANDED

United States Court of International Trade

One Federal Plaza

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Decisions of the United States Court of International Trade

(Slip Op. 85–64)

UNITED STATES, PLAINTIFF *v.* JOAN AND DAVID HELPERN CO., INC., DEFENDANT

Court No. 83–7–00969

Before FORD, *Judge.*

MEMORANDUM OPINION AND ORDER

[Defendant's motions denied.]

(Decided June 17, 1985)

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*A. David Lafer*), for the plaintiff.

Gaston Snow & Ely Bartlett (Robert O. Canty and *Daniel J. Lyne)* for the defendant.

FORD, *Judge:* The United States instituted this action against defendant Joan and David Helpern Company, Inc., for alleged violations of 19 U.S.C. § 1592. Before the Court is defendant's motion for summary judgment under Rule 56(b) of the Rules of this Court. Defendant alleges the Government's delay in initiating this action violates both the requirements of due process and the specific directive of 19 U.S.C. § 1604. In the alternative, defendant moves for dismissal with prejudice under Rule 41(b)(2) for the Government's failure to prosecute with due diligence. The Government opposes both motions in all respects. Jurisdiction is pursuant to 28 U.S.C. § 1582.

Defendant is a Massachusetts corporation doing business as a wholesaler of footwear. Between October 2 and November 29, 1978, defendant, through its customs broker, imported boots from Italy under eleven customs consumption entries at the Port of Boston. The Government filed this action on July 21, 1983, alleging the entries involved constitute violations of Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592.

As noted above, the entries at issue were made in October and November of 1978. Upon arrival of the merchandise at the Port of Boston, defendant's customs broker paid the freight charges and

prepared the consumption entry forms based on the documentation accompanying the shipment. Duty was paid on the merchandise as entered, and the boots were shipped to defendant's place of business. Soon thereafter, the Customs Service requested a sample of the merchandise, which defendant promptly forwarded.

On August 15, 1979, defendant was issued a Prepenalty Notice demanding $18,400.00 in loss of revenues and $73,601.92 in damages or fraud in the importation of the merchandise. It is alleged the entries were false and material in that they stated the merchandise was footwear having uppers of which over 90 percent were rubber or "plastic, other" with a duty rate of 6 percent. In fact, the uppers were less than 90 percent rubber or "plastic, other" and the applicable duty rate was 20 percent, resulting in an actual loss of $678.58 in duties. On February 11, 1980, defendant was served with formal Notice of Penalty in the above amounts. Defendant filed a request for mitigation on February 20, 1980.

In May of 1980, Customs again issued a Prepenalty Notice to defendant. Defendant waived all notice periods and sought consideration of its request for mitigation. On October 21, 1980, the request was denied and payment was demanded.

On March 10, 1981, the United States instituted an action against defendant under 19 U.S.C. § 1592 in U.S. District Court in Boston. Two days later the action was voluntarily dismissed by reason of this Court's exclusive jurisdiction of actions brought under 19 U.S.C. § 1592.

Some fifteen months later, in May of 1982, defendant received customs invoices totaling $17,721.90. As this figure corresponded with the loss of revenue claimed by Customs, defendant offered to make payment on the condition of full satisfaction of the claim. On July 14, 1982, defendant was notified by its surety of a demand by the Government for payment of $17,721.90. Defendant informed the surety the matter was being contested. The Government withdrew its demand and notified defendant that a new complaint would be issued.

One year later, on July 21, 1983, the present action was filed. The Government moved to amend its complaint on August 3, 1983. Defendant moved for an extension of time to September 5, 1983 to file its answer. Defendant served its answer on September 2, 1983. However, due to either clerical or mailing error, the answer was not recorded by the Court at that time.

On January 16, 1984, an Offer in Compromise was submitted to the Government by defendant. In October of 1984, defendant was notified its answer had not been recorded by the Court.[1] On November 27, 1984, defendant's motion to record its answer effective September 2, 1983, was granted. Defendant's Offer in Compromise was rejected by the Government on February 13, 1985, at which

[1] This fact was brought to the attention of the Government attorney by the Court, who in turn notified counsel for the defendant.

time the Government served defendant a Request for Production of Documents. Defendant filed the motions presently before the Court on March 7, 1985.

Defendant's motion for summary judgment cites 19 U.S.C. § 1604, the relevant part of which reads:

> It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty of forfeiture has been incurred by reason of such violation * * * forthwith to cause the proper proceeding to be commenced and prosecuted, without delay, for the recovery of such fine, penalty or forfeiture * * *

Defendant's alternative request for relief is dismissal under Rule 41(b)(2) of the Rules of this Court, which provides:

> (b) * * *
> (2) Whenever it appears that an assigned action is not being prosecuted with due diligence, the court may upon its own initiative after notice, or upon motion of a defendant, order the action dismissed for lack of prosecution.

The crux of defendant's alternate claims for relief centers on the Customs Service delay in processing the penalty claim at the administrative level, which together with the Government's inaction in prosecuting this action, allegedly amounts to material prejudice requiring this lawsuit be dismissed. Of initial concern is defendant's motion for summary judgment under Rule 56(b). The law is well-settled that summary judgment may not be granted if any genuine issue of fact exists between the litigants. *Golding Bros.* v. *United States,* 6 CIT —, Slip Op. 83–89 (1983); *S.S. Kresge Co.* v. *United States,* 77 Cust. Ct. 154, C.R.D. 76–6 (1976). The burden of proof in establishing the lack of a triable issue is upon the moving party. *Symphonic Electronics Corp.* v. *United States,* 77 Cust. Ct. 147, C.R.D. 76–5 (1976); *Gimbel Bros.* v. *United States,* 73 Cust. Ct. 223, C.R.D. 74–8 (1974). This burden requires the moving party to clearly establish the lack of disputed facts.

The chronology of events previously noted herein is not in dispute. However, the substantive issue in this case has yet to be either heard by the Court or briefed by the parties. The statute of limitations governing the commencement of actions brought pursuant to 19 U.S.C. § 1592 is 19 U.S.C. § 1621, which affords the Government five years from the discovery or commission of a violation to commence suit. This case was commenced within that period, and as the action is not time-barred, triable issues of fact remain before the Court and this matter is thus not ripe for summary judgment. Defendant's motion for summary judgment must, therefore, be denied.

Of far greater concern to the Court is defendant's motion to dismiss with prejudice under Rule 41(b)(2). The basis for this motion is similar to defendant's claim in its motion for summary judgment. It is alleged the extraordinary length of time between the entry of defendant's merchandise and the prosecution of this action has so materially prejudiced defendant's position to warrant dismissal.

Defendant offers several instances which, it alleges, support its contention of detrimental prejudice. Defendant's original attorney in this case, as well as the person who handled the entries at defendant's customs broker, have passed away in the intervening period. Defendant's comptroller and chief financial investigator has since retired, and discussions with him have not yielded the fact-specific information required to properly prepare a defense in this action. Defendant notes neither its request for mitigation nor its Offer of Compromise were responded to by the Government in a meaningful manner, the net effect of which was to lull defendant into a belief that no further steps need be taken at any given time. In sum, defendant claims it has been estopped by the passage of time from being able to fully defend this action.

In *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency,* 461 U.S. 555 (1983), the Supreme Court reiterated the balancing test of *Barker* v. *Wingo,* 407 U.S. 514 (1972), for determining when governmental delay has abridged the right to a speedy trial. The four factors to be weighed under that test are length of delay, reason for the delay, defendant's assertion of its right, and prejudice to the defendant. That case, however, involved a forfeiture proceeding and relates solely to those situations where there has been a seizure of property. The Supreme Court held the above test was appropriate in determining whether an individual's due process rights have been violated. In the case at bar, the merchandise was not seized or detained. In fact, the merchandise involved herein has already entered the flow of commerce. Therefore, the test in $8,850 (supra) is inapplicable to the present situation. A similar determination has previously been made by this Court in *United States* v. *Murray,* 5 CIT 102 (1983).

The primary rationale underlying a dismissal under Rule 41(b) is the failure of plaintiff in his duty to process his case diligently. *Lyell Theatre Corp.* v. *Lowes Corp.,* 682 F.2d 37 (1982); *Messenger* v. *United States,* 231 F.2d 328 (1956). This duty is imposed because of the strong policy favoring prompt disposition of cases. Prejudice to defendants resulting from unreasonable delay may be presumed. *Citizens Utilities* v. *American Telephone & Telegraph Co.,* 595 F.2d 1171 (1979), cert. denied, 444 U.S. 931 (1979).

It was been more than six and one-half years since the merchandise at issue was entered. The Court recognizes the Customs Service has been faced with personnel limitations while at the same time processing record, and ever-increasing, numbers of imports into this country. The Court is similarly aware that the present

action, instituted in 1983, has since been re-assigned to three different Government attorneys.

Dismissal with prejudice for failure to prosecute is a drastic sanction which should be sparingly exercised. *Welsh* v. *Automatic Poultry Feeder Co.*, 439 F.2d 95 (1971). Such a remedy should be granted only in cases in which there is a clear pattern of delay or contumacious conduct by the plaintiff. *Navarro* v. *Chief of Police, Des Moines, Iowa*, 523 F.2d 214 (1975). In the present case, the parties, together with the administrative agency, share in the responsibility for the prolonged proceedings. The prejudice claimed by defendant, however, may or may not prove to be significant at such time this matter is tried on the merits. Therefore, the Court will deny defendant's motion to dismiss at this time, but will permit defendant leave to re-submit its motion after trial. In consideration of all the foregoing, judgment will be entered accordingly.

(Slip Op. 85–65)

ST. PAUL FIRE AND MARINE INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–8–01099

Before DICARLO, *Judge*.

MEMORANDUM OPINION AND ORDER

Plaintiff's motion to compel discovery of grand jury transcripts under Rule 37 of the Rules of this Court is denied. Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure requires that a petition to obtain grand jury transcripts be filed in the district where the grand jury convened.

[Plaintiff's motion is denied.]

(Decided June 18, 1985)

Sandler and Travis, P.A. (Andrew M. Parish and *Edward Joffe)*, for the plaintiffs.
Richard K. Willard, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office *(Kenneth N. Wolf)*, for the defendants.

DICARLO, *Judge:* Plaintiff moves under Rule 37 of the Rules of this Court for an order to compel defendant to produce transcripts of testimony before a grand jury convened in the United States District Court for the Western District of New York, relating to the indictment in *United States* v. *International Citrus of Canada, Inc. and Joseph Blum*, Criminal Docket No. 81–00094.

Plaintiff alleges that defendant has had access to this information in the preparation of its defense, and seeks access to the transcripts citing Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure.

Subsection (e)(3)(C)(i) of Rule 6 permits disclosure of grand jury transcripts "when so directed by a court preliminary to or in connection with a judicial proceeding."

Plaintiff cites no case inconsistent with the requirement that a petition to obtain grand jury transcripts from a party bound by Rule 6(e) must be brought in the court which supervised the grand jury proceedings. This requirement, set forth in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1978), was adopted in 1983 as Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure, which states: "A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened.* * *"

Although the disclosure proceeding may later be transferred to this Court, *see* Fed. R. Crim. P. 6(e)(3)(E), plaintiff's discovery request is controlled by Rule 6(e) of the Federal Rules of Criminal Procedure, and as such its petition must be directed to the United States District Court for the Western District of New York. *See Douglas Oil Co.* v. *Petrol Stops Northwest, supra; United States ex rel. Woodard* v. *Tynan*, 757 F.2d 1085, 1088 n.2 (10th Cir. 1985).

ORDERED that the motion to compel discovery is denied.

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